No. 78-379

In The

Supreme Court of the United States

October Term, 1978

W. J. HOUSE, SUPT., ETC., ET AL.,

Petitioners,

v.

JAMES C. STEWART, ETC., ET AL.,

Respondents.

Petition for a writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit
and Appendix

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v. *Petitioners,*
JAMES C. STEWART, ETC., ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit granting the appellees-respondents' motion of summary affirmance of a final judgment of the United States District Court for the Middle District of North Carolina, wherein originally the petitioners were plaintiffs and the respondents were defendants.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears as Appendix A to this petition, and is unpublished. The opinion and judgment of the United States District Court for the Middle District of North Carolina appear as Appendix B to this petition, and the opinion is reported at 83 Labor Cases ¶33,636 (CCH Labor Law Reports).

JURISDICTION

The decision sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on June 5, 1978, was not published, and appears as Appendix A of this petition. The jurisdiction of this Court to review by writ of certiorari the decision in question is conferred by Title 28, United States Code, §1254(1).

QUESTION PRESENTED

Did the Court of Appeals err in granting the appellees-respondents' motion for summary affirmance of the final judgment entered by the District Court in favor of the respondents holding that the petitioners, the Superintendent of the Greensboro, North Carolina, City Schools and the Chairman and members of the Greensboro City Board of Education, as employers, are subject to the equal pay provisions of the Fair Labor Standards Act?

APPLICABLE STATUTES

The statutes applicable to this petition are 29 U.S.C. §201, *et seq.*, including 29 U.S.C. §206(d), and said sections are set forth in Appendix C hereto.

STATEMENT OF THE CASE

This suit, instituted by the Superintendent of the Greensboro City Schools and Chairman and members of the Greensboro City Board of Education, involves the application of the equal pay provisions of the Fair Labor Standards Act to an agency of a political subdivision of the State of North Carolina. The petitioner school board contends that application of the equal pay provisions to the Board and its employees (1) is not sustainable under the Fourteenth Amendment to the United States Constitution,(2) is not within the authority granted Congress by the Commerce Clause, Art. 1, §8, cl. 3, of the United States Constitution, and (3) ignores the doctrine of *stare decisis* because the United States Supreme Court held, in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), that the entire Fair Labor Standards Act, including its equal pay provisions, does not apply to the category of employers that includes the petitioners.

On April 20, 1977, the petitioners brought this suit in the United States District Court for the Middle District of North Carolina against the respondents, the Secretary of Labor and his authorized representatives, pursuant to the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. §2201, *et seq.*, 28 U.S.C. §1331, 28 U.S.C. §1332, 28 U.S.C. §1337, 28 U.S.C. §1361, 29 U.S.C. §206(d), and 29 U.S.C. §216(b) and (c). The amount in controversy in this action is in excess of $10,000.00 exclusive of interests and costs. The petitioners sought entry of an appropriate decree that the Board and its employees are not subject to the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.* The petitioners contended, based upon the rationale of *National League of Cities v. Usery*, 426 U.S.

833, 96 S.Ct. 2465, 49 L.Ed.2d 245, 44 U.S.L.W. 4974 (1976) and upon the decisions reached in *Howard v. Ward County*, 418 F.Supp. 494 (D.N.D. 1976), and *Usery v. Owensboro-Daviess County Hospital*, 423 F.Supp. 843 (W.D. Ky. 1976), that the entire Fair Labor Standards Act, including its equal pay provisions, does not apply to the category of employers that includes the petitioners.

On or about June 16, 1977, petitioners and respondents stipulated the facts and the amount of unpaid back wages owed if it is finally ruled that petitioners are subject to the equal pay provisions, presenting the District Court with the sole question of whether or not the petitioning school board and its employees are subject to the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, including its equal pay provisions, by reason of the Board's status as a public agency, that is, an agency of a political subdivision of the State of North Carolina.

On June 20, 1977, the respondents filed a motion to dismiss the petitioner's complaint arguing that the application of the Equal Pay Act to employees of states and their political subdivisions is unaffected by *National League of Cities v. Usery, supra.*

Thereafter, on July 25, 1977, the Fourth Circuit Court of Appeals rendered its decision in *Usery v. Charleston County School District of Charleston County, South Carolina*, 558 F.2d 1169 (4 Cir. 1977). In that case, the Fourth Circuit Court of Appeals held that state and local governments are subject to the equal pay provisions of the Fair Labor Standards Act.

Subsequently, on January 9, 1978, the District Court, refusing to depart from the decision of the Court of Appeals in the *Charleston County School District* case, allowed the respondent's motion to dismiss.

An appeal was taken from that District Court opinion because the petitioners believe that the District Court erred in following the *Charleston County School District* finding that the application of the equal pay provisions to the Board and its employees "is clearly sustainable without reference to the commerce power." *Charleston County School District, supra,* at 1170, n. 9. On or about March 15, 1978, the appellee-respondents submitted in the Court of Appeals a motion to dismiss the appeal or, alternatively, to summarily affirm the judgment of the District Court. Petitioners responded in opposition to that motion on March 22, 1978.

Appellant-petitioners then submitted their Brief and Appendix on March 28, 1978. Subsequently, on April 28, 1978, respondents moved to defer their brief as appellees which motion appellants-petitioners opposed on May 2, 1978. On May 3, 1978, the Fourth Circuit Court of Appeals granted appellees-respondents' motion to defer briefing by appellees.

Thereafter on June 5, 1978, the United States Court of Appeals for the Fourth Circuit granted appellees-respondents' motion for summary affirmance.

REASONS FOR ALLOWANCE OF WRIT

There are two reasons why the Court should grant this petition. The first reason is that the Fourth Circuit decided this important issue of federal law in a way in conflict with applicable decisions of this Court. This conflict is irreconcilable and involves a fundamental principle of constitutional law established by this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), to wit, that when Congress exercises or uses its legislative power under one constitutional authority, then this Court will not uphold that legislation under another constitutional basis. The second reason is that the ruling of the Fourth

Circuit in the present cause is of far-reaching importance to all state and local governments. If that ruling is allowed to stand then numerous state and local governmental bodies and millions of tax dollars will be adversely affected. Already, another case involving this identical issue and many thousands of tax dollars has been adversely influenced by the ruling of the Fourth Circuit in this cause. *Marshall v. Owensboro-Daviess Hosp., et al.*, No. 77-3069 (6 Cir., August 9, 1978), p. 7. Petitioners submit that this issue has been allowed to percolate among the Circuit Courts of Appeal for too long and, in order to secure uniformity of judgments, this Court must grant this writ.

Congress enacted the equal pay provisions of the Fair Labor Standards Act and all the amendments thereto in a *stated exercise* of its powers under the Commerce Clause. Congress did *not exercise* or *use* any of its Fourteenth Amendment power in enacting the equal pay provisions of the Fair Labor Standards Act and in extending those provisions to the states and their political subdivisions. Petitioners do not contend that Congress must state the source of its power to legislate, but when congressional intent is to exercise a given power and where Congress specifically states its sole constitutional basis, then, petitioners submit, the Courts can look no further for congressional authority. In the Court below, the Court of Appeals reasoned that, despite the fact that Congress expressly exercised its Commerce Power in extending equal pay coverage over the states and their political subdivisions, the Congress "could have" extended the equal pay provisions against state and local governments by exercising its power under the Fourteenth Amendment. To quote a phrase used by the Court of Appeals, if Congress "has the power, it has the power" and, the reasoning goes, it is irrelevant whether

Congress chose to exercise that particular power. The Court of Appeals in the present cause did precisely that which this Court refused to do in *National League of Cities v. Usery, supra,* i.e., uphold the equal pay provisions against state and local governments by reading in congressional constitutional authority neither mentioned nor relied upon by Congress at the time of passage. Congress did not base the enactment and extension of either the Fair Labor Standards Act or its equal pay provisions on Section 5 of the Fourteenth Amendment. Congress grounded these provisions in the Commerce Clause and the equal pay provisions must stand or fall, as the minimum wage and overtime provisions have, upon a test of their constitutionality under the Commerce Clause.

In the *Civil Rights Cases,* 109 U.S. 3 (1883), this Court refused to look at the Commerce Clause as a possible source of authority for the statutes under attack in that case because the legislative history showed that Congress had relied on the Civil Rights Amendments in enacting the legislation in question. That *case stands for the proposition that when Congress refers to a source of constitutional power in legislating the Courts will not uphold the Act on another constitutional basis.* When the constitutionality of an act of Congress is in question, the courts will not look beyond the constitutional powers under which Congress explicitly acted to find constitutional authority for the enactment.

The answer to this "could have" argument has been teletyped to the Courts by Mr. Justice Rehnquist in both *National League of Cities, supra,* and *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976) and is a position which was firmly adhered to by the late Mr. Justice Black during his tenure on the Court. This answer, indeed a dispositive one, is that: "We are not here concerned with what the

Congress might have done or might yet do in the future. We are concerned in this case with what the Congress did." *Minor v. U. S.*, 396 U.S. 87 (1969) (Black, Douglas, J., dissenting); *Daniel v. Paul*, 395 U.S. 298 (1969) (Black, J., dissenting); *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (Black, Douglas, J. J., concurring).

Indeed, Mr. Justice Rehnquist answered this "could have" argument twice in the span of seven days in 1976. *National League of Cities*, at 852, n. 17; *Fitzpatrick v. Bitzer*, 44 L.W. at 5122, n. 9. In fact, Mr. Justice Rehnquist felt compelled to begin the majority opinion in *Fitzpatrick, supra*, by expressly finding that Congress was "acting" under the Fourteenth Amendment in 1972 when Title VII was extended against the States. As District Judge Gordon stated, in *Owensboro-Daviess, supra*, the Solicitor "offers no reason why a District Court should reach out for the Fourteenth Amendment in construing these amendments or the Act itself when the Supreme Court specifically refused to do this in the *League* case." 423 F.Supp. at 846.

The respondents would urge this Court to uphold the equal pay provisions based on power Congress could have relied upon *but did not*. The Supreme Court specifically declined to adopt this course in *League:*

> "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments *by exercising authority* granted it under other sections of the Constitution such as the Spending Power, Art. I, §8, cl. 1 or §5 of the Fourteenth Amendment." 49 L.Ed.2d, at 258, n. 17 (Emphasis Supplied.)

In *Fitzpatrick v. Bitzer*, 49 L.Ed.2d at 620, n. 9, this Court suggests that the outcome where Congress was

explicitly acting under §5 of the Fourteenth Amendment would not have been the same had Congress been acting under its Commerce Power as it was in *League*. Neither *Bitzer* nor *League* will support a conclusion that Congress may *accidentally* implement the Fourteenth Amendment as suggested by the respondents.

The second reason for granting this writ is that the question of the applicability of the equal pay provisions of the Fair Labor Standards Act to state and local governments is of far-reaching importance to all state and local governments. The equal pay provisions, as applied to the states *qua States*, operate to displace directly the states' freedom to structure integral operations in areas of traditional governmental functions. *National League of Cities, supra*, 96 S.Ct. at 2474 (1976). "Equal pay for equal work," to a degree much more dramatically than the somewhat pedestrian minimum wage and overtime provisions of the Fair Labor Standards Act, puts states and municipalities to the hard choice of either raising taxes or curtailing services, or otherwise reordering their priorities. The respondents remain unconcerned that petitioners may be forced to curtail embryonic athletic programs or reduce custodial services. Yet, this is precisely that which this Court held, in *National League of Cities, supra*, that the states were not required to do in areas of traditional governmental functions.

This Court, in *National League of Cities, supra*, recognized the significant impact of the provisions of the Fair Labor Standards Act upon state and local governmental bodies not only in terms of increased costs in dollars but also in terms of forced relinquishment of important governmental activities. Petitioners submit that, if the minimum wage and overtime provisions of that Act are intrusive, then the equal pay provisions are doubly intrusive.

Further, the United States District Court for the Western District of Kentucky, in *Usery v. Owensboro-Daviess County Hospital*, 423 F.Supp. 843, 845-846 (1976), found that the application of the equal pay provisions to state and local governments would

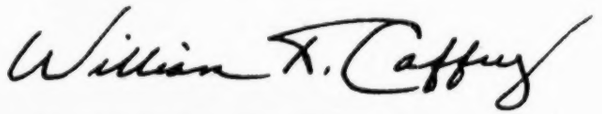
> "lead to, and apparently is leading to, chaos, not harmony, in the implementation of the Act as it now exists... The Department of Labor will apparently have power to order equal pay compliance by certain employers yet have no power to order minimum wage compliance to those same employers — even though both provisions arise from the same Act. Such disharmony was obviously not intended either by Congress or the Supreme Court." 423 F.Supp. at 845-846.

The United States Court of Appeals for the Sixth Circuit, citing the Fourth Circuit opinion in *Charleston County School Dist., supra,* disagreed in reversing that District Court on August 9, 1978. *Marshall v. Owensboro-Daviess Hosp., et. al,* No. 77-3069 (6 Cir., August 9, 1978). Petitioners cannot believe that either the Congress or this Court intended this disharmony in the implementation of the Fair Labor Standards Act and the disruption of governmental services that will continue if the ruling of the Fourth Circuit in the present cause is allowed to stand.

CONCLUSION

For the reasons set forth in this petition, we respectfully submit that certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition was served on the defendants-respondents by depositing three copies in the United States mail, with air-mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D. C., 20530, and by depositing three copies in the United States mail, with air-mail postage prepaid, addressed to Donald S. Shire, Esq., U. S. Department of Labor, Room N 2620-A, 200 Constitution Avenue, Washington, D. C. 20210.

This the 1st day of September, 1978.

Fred T. Hamlet

Fred T. Hamlet
Counsel for Petitioner
500 West Friendly Avenue
Greensboro, North Carolina 27402

Appendix A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-1089

W. J. HOUSE, SUPERINTENDENT OF THE GREENSBORO CITY SCHOOLS; WALTER T. JOHNSON, JR., CARSON BAIN, LACY G. BAYNES, JAMES E. BETTS, JOANNE BLUETHENTHAL, REVEREND CHARLES F. KLOTZBERGER AND REVEREND OTIS HAIRSTON, CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE GREENSBORO CITY BOARD OF EDUCATION, *Appellants,*

v.

JAMES C. STEWART, ASSISTANT AREA DIRECTOR, GREENSBORO AREA OFFICE, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR; HUGH B. CAMPBELL, ACTING AREA DIRECTOR, GREENSBORO AREA OFFICE, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR; AND F. RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Appellees.*

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

Submitted: May 8, 1978 Decided: June 5, 1978

Before RUSSELL, WIDENER, and HALL,
Circuit Judges

(William D. Caffrey and Fred T. Hamlet, Jordan, Wright, Nichols, Caffrey & Hill, on brief for the Appellants. H. M. Michaux, United States Attorney, and Donald S. Shire, United States Department of Labor, for the Appellees.)

PER CURIAM:

Appellants, the Superintendent of the Greensboro, North Carolina, City Schools and the Chairman and members of the Greensboro City Board of Education, petitioned the United States District Court for the Middle District of North Carolina for a declaratory judgment that they as employers were not subject to the equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* The district court denied relief, and this appeal is before us on the appellees' motion for summary affirmance.

In *Usery v. Charleston County School Dist.*, 558 F.2d 1169 (4th Cir. 1977), we held that the equal pay provisions of the Fair Labor Standards Act were constitutionally valid exercises of Congress' power under the Fourteenth Amendment. As the instant appeal presents no other issues for consideration, we rely on *Charleston County* and, accordingly, grant the appellees' motion for summary affirmance.

TO: Fred T. Hamlet, Esq.
William D. Caffrey, Esq.
H. M. Michaux, Jr., Esq.
Donald S. Shire, Esq.

CLERK'S MEMORANDUM

In compliance with Rules 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case No. 78-1089 was entered this date. A copy of the court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39(c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

Please be advised that the policy of this court requires that petitions for rehearing, regardless whether the case was fee paid or in forma pauperis, be filed in *fifteen* copies.

When it has been determined that a stay of the mandate is an appropriate course of action, then an original petition only (no copies) to stay the mandate need be filed.

William K. Slate, II
Clerk

Appendix B

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
GREENSBORO DIVISION**

W. J. HOUSE, SUPERINTENDENT OF THE GREENSBORO CITY SCHOOLS; WALTER T. JOHNSON, JR., CARSON BAIN, LACY G. BAYNES, JAMES E. BETTS, JOANNE BLUETHENTHAL, REVEREND CHARLES F. KLOTZBERGER AND REVEREND OTIS HAIRSTON, CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE GREENSBORO CITY BOARD OF EDUCATION,

Plaintiffs

No. C-77-181-G

v.

JAMES C. STEWART, ASSISTANT AREA DIRECTOR, GREENSBORO AREA OFFICE, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR; HUGH B. CAMPBELL, ACTING AREA DIRECTOR, GREENSBORO AREA OFFICE, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR; AND F. RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Defendants

MEMORANDUM OPINION

GORDON, Chief Judge

This matter is before the Court for a determination of the defendants' motion to dismiss. For the reasons which follow, the Court concludes that the motion to dismiss should be allowed.

On April 20, 1977, the plaintiffs, the Superintendent of the Greensboro City Schools and Chairman and members of the Greensboro City Board of Education, instituted this action against the defendants pursuant to the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* In substance, the plaintiffs allege that the defendants, the Secretary of Labor and his authorized representatives, have asserted and are continuing to assert that the Greensboro City Board of Education has violated the Equal Pay Act with respect to the compensation paid to certain of its female custodial employees and athletic coaches. 29 U.S.C. § 206(d). The plaintiffs, fearful of the imminent institution of legal proceedings against them for their alleged violations of the equal pay provisions of the Fair Labor Standards Act of 1938, assert that they are entitled to the entry of an appropriate decree declaring that they are not subject to the equal pay provisions contained in the Fair Labor Standards Act. On June 20, 1977, the defendants filed a motion to dismiss the plaintiffs' complaint on the ground that the complaint shows on its face that the plaintiffs are not entitled as a matter of law to the relief sought in the complaint. Accordingly, this matter is now before the Court for an appropriate disposition of the defendants' motion to dismiss.

Prior to the filing of the defendants' motion to dismiss, the parties to this action entered into a stipulation setting forth the narrow issue to be resolved by the

Court in this action. Accordingly, pursuant to the complaint and stipulations filed in this cause, the Court must now determine whether the plaintiff school board and its employees are subject to the equal pay provisions of the Fair Labor Standards Act. 29 U.S.C. § 201, *et seq.* In this regard, the plaintiffs assert that by reason of their status as an agency of a political subdivision of the State of North Carolina, that they are immune to the equal pay provisions of the Fair Labor Standards Act. 29 U.S.C. § 206(d). On the other hand, the defendants contend that the plaintiffs are subject to the equal pay provisions of the Fair Labor Standards Act.

The parties have filed extensive briefs on the point of law presently before the Court. However, subsequent to the time of the filing of the defendants' brief in support of their motion to dismiss, yet prior to the time the plaintiffs filed their brief in opposition to the motion, the Fourth Circuit Court of Appeals rendered its decision in a case involving the identical issue presented in the plaintiffs' complaint and raised by the defendants' motion to dismiss. *Usery v. Charleston County School District of Charleston County, South Carolina*, 558 F.2d 1169 (4th Cir. 1977). The sole question presented in the *Charleston County School District* decision was whether the provisons of the Equal Pay Act could be applied to state and local governments. In considering this issue, the Court stated that "... there is no doubt that the application of its provisions to state and local governments is a valid exercise of Congress' constitutional authority." *Charleston County School District, supra* at 1170-1171. Following, the Fourth Circuit Court of Appeals held that state and local governments were subject to the provisions of the Equal Pay Act. *Charleston County School District, supra* at 1172.

Absent some compelling reason to the contrary, this Court must follow the law as stated by the Fourth Circuit in resolving the controversy in the present case. Finding no sufficient reason to depart from the court's decision in the *Charleston County School District* case, the Court finds that the plaintiffs are subject to the provisions of the Equal Pay Act and, therefore, the Court concludes that the defendants' motion to dismiss should be allowed.

Accordingly, an order will be entered.

United States District Judge

January 6, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA
GREENSBORO DIVISION

W. J. HOUSE, SUPERINTENDENT OF THE GREENSBORO CITY SCHOOLS; WALTER T. JOHNSON, JR., CARSON BAIN, LACY G. BAYNES, JAMES E. BETTS, JOANNE BLUETHENTHAL, REVEREND CHARLES F. KLOTZBERGER AND REVEREND OTIS HAIRSTON, CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE GREENSBORO CITY BOARD OF EDUCATION,

Plaintiffs

v.

JAMES C. STEWART, ASSISTANT AREA DIRECTOR, GREENSBORO AREA OFFICE, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR; HUGH B. CAMPBELL, ACTING AREA DIRECTOR, GREENSBORO AREA OFFICE, WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR; AND F. RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Defendants

No. C-77-181-G
ORDER

For the reasons set forth in an Opinion filed contemporaneously herewith, it is

ORDERED that the defendants' motion to dismiss be, and the same is hereby, allowed.

United States District Judge

January 6, 1977

Appendix C

APPLICABLE STATUTES

The Equal Pay Act of 1963 (EPA), Pub. L. No. 88-38 §3, 77 Stat. 56, 29 U.S.C. §206(d)(1), provides:

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

In the "Declaration of Purpose" of Section 2 of the Equal Pay Act of 1963, P.L. 88-38, 77 Stat. 56, it states:

> "(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce... to correct [these] conditions... in such industries."

No. 78-379

In the Supreme Court of the United States

OCTOBER TERM, 1978

W. J. HOUSE, SUPERINTENDENT OF THE GREENSBORO CITY SCHOOLS, ET AL., PETITIONERS

v.

JAMES C. STEWART, ASSISTANT AREA DIRECTOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-379

W. J. HOUSE, SUPERINTENDENT OF THE GREENSBORO CITY SCHOOLS, ET AL., PETITIONERS

v.

JAMES C. STEWART, ASSISTANT AREA DIRECTOR, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 4a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1978. The petition for a writ of certiorari

was filed on September 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Equal Pay Act may be applied to the states and their subdivisions.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The pertinent provisions of the Equal Pay Act of 1963, 29 U.S.C. 206(d), are set out at Pet. App. 10a.

2. The Fourteenth Amendment provides in relevant part:

> SECTION 1. * * * No state shall * * * deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. The Commerce Clause, Art. I, Sec. 8, Cl. 3 provides in relevant part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *

STATEMENT

Petitioners brought this action seeking a declaratory judgment that the Greensboro City Board of Education, as a political subdivision of a state, is not

subject to the Equal Pay Act. The district court, following *Usery* v. *Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977), granted respondents' motion to dismiss for failure to state a claim on which relief could be granted.

Charleston County held that the Equal Pay Act may constitutionally be applied to states and their subdivisions. The court rejected the argument that this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which invalidated a portion of the Fair Labor Standards Act as applied to the states, requires invalidation of the Equal Pay Act. Instead, the court of appeals relied on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), and held that the Equal Pay Act's application to the states is a constitutional exercise of Congress' power under Section 5 of the Fourteenth Amendment to secure equal rights without regard to gender. In light of its earlier decision in *Charleston County*, the court of appeals here summarily affirmed the district court's decision.

ARGUMENT

Four courts of appeals have addressed the question whether the Equal Pay Act constitutionally may be applied to the states. Each has held that it may be.[1] Three of these courts, including the court below, have held that the Act as applied to states is a proper exercise of Congress' power under the Fourteenth

[1] Thirty-five district courts have reached the same conclusion. A list of these cases, and of one contrary decision, is attached as an Appendix to this brief.

Amendment. *Usery* v. *Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977); *Usery* v. *Allegheny County Institution District*, 544 F.2d 148 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977); *Marshall* v. *Owensboro-Daviess County Hospital*, 581 F.2d 116 (6th Cir. 1978). See also *Marshall* v. *City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978) (upholding the Act under the Commerce Clause). There is thus no conflict among the circuits and no reason for review by this Court.

This Court held in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), that the Fourteenth Amendment worked a fundamental alteration of the allocation of power within our federal system. *Fitzpatrick* therefore sustained, against an Eleventh Amendment challenge, the power of Congress to provide for back pay as a remedy for unequal treatment on account of sex. The Equal Pay Act achieves the same objective—equal treatment without regard to sex—and is constitutional under the same grant of power to Congress. As the Court stated in *Ex parte Virginia*, 100 U.S. 339, 347-348 (1880), "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete."

Petitioner argues that the Equal Pay Act must fall with the Fair Labor Standards Act, part of which this Court held unconstitutional in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). It is true

that the Equal Pay Act was placed within the Fair Labor Standards Act, but that does not end the matter. The Equal Pay Act is a separately considered statute enacted in 1963. It was "enacted at a different time, and aimed at a separate problem—discrimination on account of sex in the payment of wages" (*Usery* v. *Allegheny County Institution District*, *supra*, 544 F.2d at 155). The Fair Labor Standards Act contains a broad severability clause (29 U.S.C. 219), and so there is no reason why the Equal Pay Act should be affected by *National League*, unless the rationale of *National League* applies here as well.

We already have discussed the most important difference between this case and *National League;* although the minimum wage and overtime provisions of the Fair Labor Standards Act were enacted under the authority of the Commerce Clause alone, the sex discrimination provisions at issue here draw support from Section 5 of the Fourteenth Amendment as well as from the Commerce Clause.

Petitioner responds that the Equal Pay Act must be assessed as if it drew its authority from the Commerce Clause alone, because Congress explicitly invoked its Commerce Clause power when enacting the statute. The court of appeals properly rejected the argument that Congress must cite the correct source of power when enacting a statute;[2] the constitutionality of Acts of Congress depends on the substance of their provisions, not on whether the com-

[2] See *Usery* v. *Charleston County School District*, *supra*, 558 F.2d at 1171. See also *Usery* v. *Allegheny County Institution District*, *supra*, 544 F.2d at 155.

mittee reports or the preamble contain particular invocations of authority. The procedures for the enactment of legislation specified by Article I of the Constitution do not require Congress to publish legislative history or write a preamble to each statute—let alone to state an accurate constitutional theory in such documents. Nothing in Article I, or elsewhere in the Constitution, authorizes a court to strike down otherwise valid legislation merely because Congress misconceived the source of its authority to enact it. "In exercising the power of judicial review * * * we are concerned with the *actual powers* of the national government" (*Usery* v. *Allegheny County Institution District*, *supra*, 544 F.2d at 155; emphasis added).

The proper question is "whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained." *Keller* v. *United States*, 213 U.S. 138, 147 (1909). Indeed, Title VII of the Civil Rights Act of 1964, which this Court upheld in *Fitzpatrick* as an exercise of authority under Section 5 of the Fourteenth Amendment, also purported to be only an exercise of authority under the Commerce Clause. At the time Title VII was enacted in 1964 it applied only to private persons, just as the Equal Pay Act applied only to private persons when it was enacted in 1963. There therefore would have been no basis for a congressional assertion of power under the Fourteenth Amendment, which applies only to state action. Similarly, when Title VII was made applicable to the states in 1972, and when the Equal Pay Act was made applicable to petitioners in 1966 (and to other

governmental entities in 1974), there was no reason for Congress to rely heavily on its powers under the Fourteenth Amendment. The Civil Rights Act of 1964 had been sustained as a valid Commerce Clause enactment (*Katzenbach* v. *McClung*, 379 U.S. 294 (1964)), and the 1966 extension of the Fair Labor Standards Act to governmental entities like petitioner also was sustained as a valid Commerce Clause enactment (*Maryland* v. *Wirtz*, 392 U.S. 183 (1968)). The fact that *National League* now has held that reliance upon the Commerce Clause was misplaced does not mean, however, that the Equal Pay Act may not be upheld under the Fourteenth Amendment. Under our constitutional system, a court is not authorized to invalidate a statute, otherwise within the substantive powers of Congress, just to see whether Congress would re-enact the statute with a different citation of constitutional authority.[3]

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[3] Petitioners argue that the *Civil Rights Cases*, 109 U.S. 3 (1883), demonstrate that the Court will look only to the constitutional basis named by Congress. The Court there remarked that particular legislation was not "conceived" as implementing the Commerce Clause, and that "no other ground of authority for its passage [had been] suggested" (109 U.S. at 25). The Court has since explained that this passage means only that the government had not relied on the Commerce Clause or argued that issue to the Court. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 252 (1964). Indeed, the Court itself has sustained an Act of Congress on a ground that Congress did not invoke; in *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-107 (1971), the Court upheld the statute under Section 2 of the Thirteenth Amendment and the constitutional privilege of interstate travel in order to avoid considering the meaning of the Privileges and Immunities Clause of the Fourteenth Amendment, on which Congress had relied.

Moreover, the Equal Pay Act is a valid exercise of power under the Commerce Clause, without regard to its validity under the Fourteenth Amendment. *National League* did not hold that Congress lacks any power under the Commerce Clause to regulate the states; the Court specifically stated (426 U.S. at 852-855) that it was not disturbing the holdings of *Fry* v. *United States*, 421 U.S. 542 (1975), *Parden* v. *Terminal R.R.*, 377 U.S. 184 (1964), *California* v. *Taylor*, 353 U.S. 553 (1957), and *United States* v. *California*, 297 U.S. 175 (1936), all of which sustained legislation, enacted under the commerce power, regulating states in their role as employers.

The Court concluded in *National League* that the Commerce Clause does not establish sufficient authority for the federal government to interfere in certain attributes of sovereignty that the states and their subdivisions exercise in carrying out traditional functions of government. The Equal Pay Act does not interfere in any significant way with the manner in which states are permitted to carry out their functions.

The minimum wage and overtime provisions of the Fair Labor Standards Act set wage and hour standards that could have required the states to rearrange the way jobs were performed and to pay their employees higher wages than state statutes provided. The Equal Pay Act, by contrast, does not compel any state to pay one wage rather than another. States retain full control over the wages paid to their employees; they retain full control over the number of employees to hire for each job, and what hours

they shall work. The Equal Pay Act provides only that, once the state in its sole discretion has set a wage rate for employees of one sex, it must pay the same rate to employees of the other sex doing substantially equal work. This does not impinge on state autonomy or threaten to undermine the performance by the states of any of their essential and customary functions.[4] Therefore, under the standards this Court applied in *National League*, the Equal Pay Act would be a permissible exercise of the commerce power even if it stood on that power alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

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[4] Indeed, states could not reasonably claim that they have an interest in paying different wages to men and women who do the same work, because such sex discrimination would violate the Equal Protection Clause of the Fourteenth Amendment. It is hard to see how a state could argue that violations of the Equal Protection Clause are an "essential attribute" of its sovereignty.

APPENDIX

1. District court decisions upholding the Act after *National League of Cities.*

Christensen v. *Iowa*, 417 F. Supp. 423 (N.D. Iowa 1976)

Usery v. *Sioux City Community School District*, No. C-76-4024 (N.D. Iowa Aug. 20, 1976)

Usery v. *Fort Madison Community School District*, No. C-75-62-1 (S.D. Iowa Sept. 1, 1976)

Usery v. *Bettendorf Community School District*, 423 F. Supp. 637 (S.D. Iowa 1976)

Usery v. *Berkeley Unified School District*, No. C-75-1558 SAW (N.D. Cal. Sept. 27, 1976)

Usery v. *Kent State University*, No. 75-550 (N.D. Ohio Oct. 6, 1976), appeal pending, No. 77-3284 (6th Cir.)

Usery v. *Washoe County School District*, No. 75-216 BRT (D. Nev. Oct. 14, 1976)

Usery v. *University of Nevada*, Reno No. 75-62 BRT (D. Nev. Oct. 13, 1976)

Usery v. *Dallas Independent School District*, 421 F. Supp. 111 (N.D. Tex. 1976), appeal pending, No. 77-2174 (5th Cir.)

Usery v. *University of Texas*, No. EP-75-CA-221 (W.D. Tex. Oct. 14, 1976)

Usery v. *Memphis State University*, No. C-75-54 (W.D. Tenn. Oct. 29, 1976)

Usery v. *Baltimore County School District*, No. K-76-762 (D. Md. Nov. 16, 1976)

Usery v. *City of Brockton*, No. 76-2265-M (D. Mass. Nov. 9, 1976)

Usery v. *Morrissey*, No. CA-74-2311 (D. Mass. Nov. 9, 1976)

Usery v. *A&M Consolidated Independent School District*, No. 74-H-1532 (S.D. Tex. Nov. 30, 1976), appeal pending, No. 77-2495 (5th Cir.)
Usery v. *Tennessee Technological University*, No. 75-7-NE-CV (M.D. Tenn. Dec. 14, 1976)
Usery v. *Austin Peay State University*, No. 75042-NA-CV (M.D. Tenn. Dec. 14, 1976)
Usery v. *Kenosha Unified School District Number One*, No. 73-C-399 (E.D. Wis. Dec. 13, 1976)
Brown v. *County of Santa Barbara*, 427 F. Supp. 112 (C.D. Cal. 1977)
National League of Cities v. *Marshall*, No. 74-1812 (D. D.C. Jan. 31, 1977) (three-judge court)
Usery v. *Eastern Kentucky University*, No. C.A. 76-15 (E.D. Ky. Jan. 21, 1977)
Usery v. *Council Bluffs Community School District*, No. 76-26-W (S.D. Iowa Jan. 27, 1977)
Usery v. *Oregon*, No. 74-629 (D. Ore. Feb. 14, 1977), appeal pending, No. 77-2813 (9th Cir.)
Usery v. *Miami University*, No. C-1-75-240 (S.D. Ohio Feb. 14, 1977)
Usery v. *Edward J. Meyer Memorial Hospital*, No. C-71-453 (W.D. N.Y. April 4, 1977)
Usery v. *County of Oakland*, No. C.A. 6-70593 (E.D. Mich. Apr. 14, 1977)
Marshall v. *City of Torrington*, No. H-74-159 (D. Conn. July 1, 1977)
Usery v. *Board of Education*, Civ. No. 15,071 (D. Conn. July 7, 1977)
Marshall v. *Board of Education*, Civ. No. 75-453 (W.D. N.Y. July 12, 1977)
Usery v. *McCarthy*, No. C.A. 76-2149-T (D. Mass. July 22, 1977) (three-judge court)

Nilsen v. *Metropolitan Fair & Exposition Authority*, No. 76-C02856 (N.D. Ill. Aug. 18, 1977)
Marshall v. *Independent School District No. 271*, No. 4-76 Civ. 274 (D. Minn. Oct. 3, 1977)
Wilkins v. *University of Houston*, No. 75-H-644 (S.D. Tex. Nov. 22, 1977)
Marshall v. *Nassau County Medical Center*, No. 77 C 540 (E.D. N.Y. Feb. 17, 1978)
Marshall v. *Evans-Bryant Central School District*, Civ. No. 77-209 (W.D. N.Y. Jan. 12, 1978)

2. District court decision holding the Act invalid. *Howard* v. *Ward County*, 418 F. Supp. 494 (D. N.D. 1976)

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